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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1969

No. [redacted] 122

JESSE FREEMAN, et al.,
Petitioners,

v.

THE GOULD SPECIAL SCHOOL DISTRICT OF LINCOLN COUNTY, ARKANSAS, et al.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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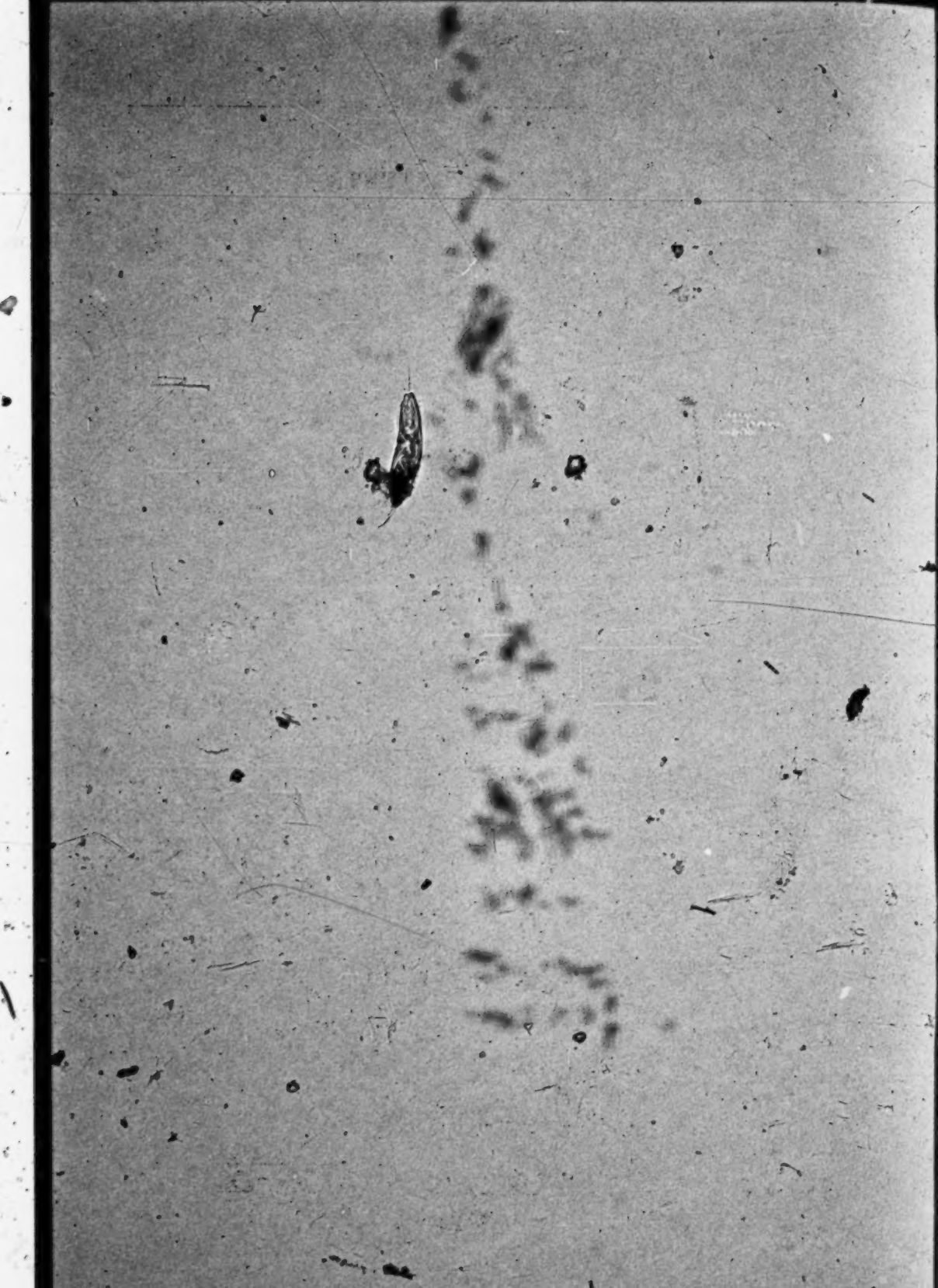

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 1401.

JESSE FREEMAN, et al.,
Petitioners,

v.

THE GOULD SPECIAL SCHOOL DISTRICT OF LINCOLN COUNTY, ARKANSAS, et al.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION.

QUESTIONS PRESENTED.

Petitioners set out the first Question Presented as follows (Pet. 2):

> 1. Does the due process clause of the Fourteenth Amendment protect public school teachers from discharge from their employment upon a principal's unfounded and unsupported allegations of incompetence and insubordination?

The facts presupposed by this question are not supported by the Record of this case. None of the petitioners were "discharged" prior to the expiration of their con-

tractual term of employment. Rather, each of their contracts had expired and petitioners were advised, pursuant to the pertinent state statute, that their teaching contracts would not be renewed for the ensuing school year (Pet. 2a). Secondly, even assuming the principal's charges were "unfounded and unsupported," the Board's action was not based solely upon his recommendation. Although there is some basis for so describing the initial decision of the Board, the ultimate disposition of petitioners' claims to continued employment was based on the Board's independent investigation of the controversy between the principal and petitioners, as well as the former's recommendation (R. 225-226, Pet. 12a). The only question legitimately presented by the Record and the decision of the courts below on this phase of the case is:

> 1. Does the due process clause of the Fourteenth Amendment require a school board which is not subject to teacher tenure laws to rehire individuals which it deems, based on their principal's recommendation and the board's own independent investigation, ill suited for employment in the schools of the district, where the reasons for the board's action are not based on racial or religious discrimination or the assertion by the teachers of their constitutional rights?

The second Question Presented as stated by petitioners is (Pet. 2):

> 2. Does the due process clause of the Fourteenth Amendment require that public school teachers be afforded a hearing and an opportunity to confront their accuser prior to their discharge from employment upon a principal's unfounded and unsupported allegations of incompetence and insubordination?

Insofar as this question presupposes a "discharge from employment" and action by the Board predicated solely

on the principal's allegations, it is subject to the same criticism as Question 1.

Moreover, the Record and prior decisions in this case unequivocally establish, and petitioners admit, that two separate hearings were afforded petitioners at which they were invited to present anything which they deemed pertinent to the Board (Pet. 6, 3a). Petitioners did not request an opportunity to confront or cross-examine the principal who recommended their discharge (Pet 12a). Thus, the only question properly presented which pertains to the procedures employed by the Board in handling petitioners' complaints is:

> "Does the due process clause of the Fourteenth Amendment require that a school board which refuses to renew a teacher's contract afford the teacher an opportunity to confront and cross-examine his principal who has recommended that the teaching contract not be renewed, when no such opportunity is requested of the board?"

The final Question Presented, as phrased by petitioners, is (Pet. 2):

> "3. Where a district court, after hearing contradictory testimony from school administrative officials and discharged teachers, explicitly resolves none of the factual disputes between the parties, has the district court failed to satisfy the requirements of Rule 52 (a) of the Federal Rules of Civil Procedure?"

This question, as presented by petitioners, incorrectly states that the district court's findings of fact explicitly resolved none of the factual disputes between the parties. To the contrary, the district court expressly found that petitioners' allegations of racial discrimination were totally unsupported and that the Board's action in refusing to renew petitioners' teaching contracts was a proper ex-

ercise of its discretion (Pet. 30a). The only question presented by this case which in any way pertains to the sufficiency of the district court's compliance with Rule 52(a) is:

> "Where a district court, after hearing contradictory testimony upon allegations by public school teachers of racial discrimination and arbitrary, capricious and unreasonable action on the part of school administrative officials who refused to renew their contracts, expressly finds that the Board acted without racial discrimination and within its proper discretion in refusing to renew the contracts, has the district court failed to satisfy the requirements of Rule 52 (a) of the Federal Rules of Civil Procedure?"

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Petitioners assert that 42 U. S. C., § 1981, is involved in this case (Pet. 3). That statute provides as follows:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security for persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Petitioners' complaint asserted that their contracts were not renewed because the Board discriminated against them because of their race and attempted to impede faculty desegregation (Pet. 3a). The district court expressly found that petitioners' employment was terminated for reasons wholly unrelated to any improper racial consid-

erations (Pet. 30a). Petitioners abandoned these contentions in their appeal to the court of appeals (Pet. 6a). That court noted however, that the district judge's findings of a lack of racial discrimination were clearly supported by the evidence and that no evidence was presented on the second allegation (Pet. 6a). There is thus no issue of racial discrimination before this Court and 42 U. S. C., § 1981, is not involved in this case.

STATEMENT.

Petitioners are Negro teachers who had been employed by respondent district for periods ranging from less than one year to 36 years (R. 5). Their performance as teachers had not been "altogether" satisfactory prior to the 1966-67 school year (R. 217-18). Complaints against some of the teachers had been made for the last eight years (R. 228). Horace Dalton, Negro principal of the Fields School where petitioners taught, had indicated dissatisfaction with some of these teachers prior to the 1966-67 school year (R. 217). The Board had nevertheless rehired these teachers for the 1966-67 term (R. 217).

In a letter dated May 1, 1967,[1] Principal Dalton recommended to Superintendent Sage that petitioners' teaching contracts not be renewed in the 1967-68 terms, citing specific complaints regarding each teachers' conduct along with the observation they were generally uncooperative with the school program (R. 246). Dalton had mentioned some of these matters to the teachers in his conferences with the faculty at Fields School (R. 39). Superintendent Sage then recommended that the Board not rehire petitioners (R. 246). The Board accepted this recommendation (R. 251) and on or about June 1, 1967, notice of nonrenewal was provided to the petitioners (R. 220).

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[1] At page 7, n. 5 of their petition, petitioners quote portions of the letter but do not reproduce it in full. In addition to those portions quoted by petitioners, the letter contained the following introductory paragraph:

> "Members of the School Board
> Superintendent T. Raymond Sage
> Gould, Arkansas
>
> Dear Members and Superintendent:
>
> Mr. Matlock and myself have worked this program out together all year, and we have come to the conclusion that these people do not meet the requirements of a good school system. I have recommended these people for no contract."

The letter also recommended that the contracts of 15 other teachers be renewed (R. 246).

Thereafter, the petitioners requested and were granted a hearing in connection with the action of the Board (R. 220-21). Petitioners were advised of the charges in Dalton's letter and of the fact that Dalton had recommended that they not be rehired (R. 221). Each case was discussed and the teachers were allowed to state any matters which they desired to bring to the Board's attention (R. 221). The Board's decision was reaffirmed and on June 8, 1967, this suit was filed (R. 2).

Depositions were taken from Principal Dalton, Superintendent Sage and most of the petitioners. During her deposition, Mrs. Theresa N. Wilhite, one of the petitioners, alleged that Dalton had made improper sexual advances to her approximately nine months earlier in October, 1966 (R. 142-43). This was the first notice of such an allegation against Dalton, although some such activity had been broadly hinted at by Mrs. Wilhite during the first hearing (R. 196-97). Dalton denied the charges (R. 106-07, 197).

On the basis of matters developed in the depositions, petitioners were offered another hearing before the Board and they attended, with their attorneys, in the Gould High School Auditorium on July 11, 1967 (R. 222, 233). Both before and after the hearings, the individual members of the Board conducted an independent examination of the situation (R. 222, 225, 226) including visits with patrons of the district and other school officials such as Assistant Principal Matlock at Fields School, Principal W. R. Little of the Gould School, Mrs. Dalton (head teacher at the Fields Elementary School) and other teachers (R. 226, 248-50).

Based on the additional investigation of the Board members, the information developed at both of the hearings afforded petitioners and an independent assessment of the fitness of petitioners to continue teaching in the district, the Board again reaffirmed its decision not to re-employ petitioners (R. 225, 227-28).

ARGUMENT.

Petitioners' Question No. 1 would have this Court review the court of appeals' holding that a school teacher has no right to continued public employment, except insofar as he may not be dismissed or not rehired for constitutionally impermissible reasons, such as race, religion, or the assertion of rights guaranteed by statute or the Constitution. Petitioners argue that in a state such as Arkansas which has no laws or regulations granting tenure rights to school teachers, a local school board's refusal to renew a particular teacher's contract after its expiration can be sustained only if the board's decision comports with Fourteenth Amendment standards of substantive due process. The significance of this case is thus limited in that it does not concern the discharge of a teacher prior to the expiration of his contractual term of employment,[2] nor does it involve employment rights of teachers in states which have teacher tenure laws or other regulations which grant job security to teachers (Pet. 6a). The decision of the court of appeals fully comports with the Arkansas Supreme Court holding in **Johnson v. Wert**, 225 Ark. 91, 279 S. W. 2d 274 (1955), and the language of this Court in **Shelton v. Tucker**, 364 U. S. 479 (1960). In **Johnson** the Arkansas Supreme Court held that:

> (T)he discretion of school boards in respect to the making of employment contracts with teachers is very broad. Ordinarily the board has the absolute right to decline to employ or re-employ any applicant for any reason whatever or for no reason at all. 279 S. W. 2d at 276.

Likewise, this Court has indicated a similar conclusion in its opinion in **Shelton v. Tucker**, where it was stated:

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[2] **Crownover v. Alread School District No. 7**, 211 Ark. 449, 200 S. W. 2d 809 (1947), applies more stringent standards in such a case.

> Teachers there (in Arkansas) are hired on a year-to-year basis. They are not covered by a civil service system, and they have no job security beyond the end of each school year. The closest approach to tenure is a statutory provision for the automatic renewal of a teacher's contract if he is not notified within ten days after the end of a school year that the contract has not been renewed.
>
> * * *(T)he teacher serves at the absolute will of those to whom the disclosure (lists of organizations belonged to within the last five years) must be made—those who any year can terminate the teacher's employment without bringing charges, without notice, without a hearing, without affording an opportunity to explain. 364 U. S. 479, 482, 486 (1960).

The court of appeals' opinion recognized that an Arkansas school board could not constitutionally discharge or refuse to rehire a teacher because of his race or religion or his assertion of basic constitutional rights, such as speech,[3] association[4] and the privilege against self-incrimination[5] (Pet. 9a). No such conduct is involved here. Petitioners merely complain that the principal who recommended their discharge is incompetent and that some of his charges against them were untrue. The courts below deemed these allegations to present no justiciable federal question (Pet. 13a, 29a). The decision sought to be reviewed is therefore not in conflict, either in direct holding or in principle, with any pertinent decision of this Court or of the courts of appeal.

Moreover, both courts which have considered the case have held in the alternative that even if the board's ac-

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[3] **Pickering v. Board of Education,** 391 U. S. 563 (1968).

[4] **Shelton v. Tucker,** 364 U. S. 479 (1960).

[5] **Slochower v. Board of Higher Education,** 350 U. S. 551 (1956).

tions were tested by substantive due process standards, petitioners have shown no abuse of discretion (Pet. 13a and 30a). Yet petitioners now ask this court to review the testimony and make its own determination whether the Board acted reasonably. A grant of the relief sought by petitioners will insure that every disenchanted school teacher whose contract is not renewed may resort to federal court and ultimately, this Court, to test the propriety of the board's action, contrary to the settled policy of this court against intervention in the daily operation of school systems of this country on questions which do not directly and sharply implicate basic constitutional values. See **Shelton v. Tucker**, 364 U. S. 479, 487 (1960); **Epperson v. Arkansas**, 393 U. S. 97 (1968).

Question No. 2 relates to the procedures implemented by the Board in dealing with petitioners' grievances. This Court is requested to hold that petitioners were entitled as a matter of right to procedural safeguards which were either not requested by them or were, in fact, granted to them. The court of appeals noted that the Board granted petitioners' request for a hearing and allowed their counsel to be present at the second hearing although it was not obligated to do so, citing an Arkansas Attorney General's opinion (Pet. 11a) and **Studemeyer v. Macy**, 321 F. 2d 386 (D. C. Cir. 1963), cert. denied 375 U. S. 934, and that petitioners had not requested an opportunity to cross-examine the principal (Pet. 12a). No justiciable issue is presented by this question since petitioners lack standing to assert rights to a hearing and confrontation, according to this Court's settled rules of deciding constitutional questions. **Ashwander v. Tennessee Valley Authority**, 297 U. S. 288 (1936) (concurring opinion).

Petitioners candidly concede that Question No. 3 concerns matters not ordinarily of sufficient import to warrant review by this Court (Pet. 16), i. e. whether the dis-

trict judge's findings of fact are sufficiently detailed to comply with Federal Rule of Civil Procedure 52 (a).[6] A review of this question can only affect the parties to this case.

CONCLUSION.

The decision of the court of appeals is correct; it is in accord with the applicable decisions of this Court and those of the other courts of appeals and the questions petitioners seek to present here are insubstantial. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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[6] The court of appeals held the findings sufficient (Pet. 16).